NO. 85653-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of,

MANSOUR HEIDARI,

Petitioner.

STATE'S SUPPLEMENTAL BRIEF

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A. ISSUE PRESENTED.

Where insufficient evidence supports a conviction, does the appellate court have the authority to direct entry of judgment for a lesser included offense where the jury necessarily found all the elements of that crime?

B. STATEMENT OF THE CASE.

The petitioner, Mansour Heidari, was charged with five acts of sexual abuse against his niece. Counts I and III charged the defendant with rape of a child in the first degree, Counts II and IV charged him with child molestation in the first degree, and Count V charged him with child molestation in the third degree.

The victim of these crimes, B.Z., was born on March 29, 1986. 3RP 324.[1] B.Z.'s uncle, Mansour Heidari, and his wife lived in the Seattle area near B.Z.'s family, and throughout the years she would visit the Heidari home regularly. 3RP 285-88, 331. B.Z. was very close to the family, and considered Heidari her favorite uncle. 3RP 288, 308.

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[1] The Verbatim Report of Proceedings from the trial will be referenced herein as follows: 1RP refers to October 3 and 7, 2002; 2RP refers to October 8, 2002; 3RP refers to October 9 and 10, 2002; 4RP refers to October 14, 2002; 5RP refers to October 15 and November 22, 2002.

When B.Z. was in the fourth grade, the defendant began to sexually abuse her. B.Z. testified to incidents of abuse that occurred from the time that she was in fourth grade until she was in ninth grade. Only the facts related to Count IV are relevant to the issue presented to this Court.

In regard to Count IV, B.Z. testified that when she was in the sixth grade, she was in Heidari's home, playing with her aunt's makeup in the master bedroom when Heidari emerged from the bathroom wearing only a robe. 3RP 354, 357-58. Heidari sat down on the edge of the bed and told B.Z. to "come over here," and pulled her leg toward him. 3RP 358. Heidari then pulled his robe away and exposed his penis to her. 3RP 358. B.Z. testified that his penis was erect and described the appearance of a circumcised penis. 3RP 359-60. Heidari put his hand on B.Z.'s head and tried to push her down toward his penis. 3RP 360-61. B.Z. moved her head to the side and ran out of the bedroom. 3RP 361.

The State charged Heidari with child molestation in the first degree. However, the trial court ruled there was insufficient evidence that B.Z. was less than twelve years old at the time of the crime, and the court instructed the jury as to the lesser included offense of child molestation in the second degree. The jury found

Heidari guilty of child molestation in the second degree. 5RP 629-30. Heidari was also convicted of rape of a child in the first degree (Count I) and child molestation in the third degree (Count V). 5RP 627, 630. The jury acquitted Heidari of Counts II and III. 5RP 628.

Heidari appealed his convictions. The Court of Appeals affirmed on direct appeal and this Court denied review. Mandate issued on December 9, 2005. Heidari filed a previous personal restraint petition, alleging prosecutorial misconduct. That petition was dismissed on April 20, 2007.

C. SUMMARY OF ARGUMENT.

For over 100 years Washington courts have exercised their common law authority to remand for entry of judgment on a lesser offense necessarily found by the trier of fact where conviction for a greater offense is reversed for reasons that affect only the greater offense. This practice is utilized by other courts and has been approved by the United States Supreme Court. This practice does not violate the Double Jeopardy Clause because the defendant does not face a second prosecution or multiple punishments. There is no compelling reason for this Court to impose a limitation

on the appellate court's authority to order remand for entry of judgment on a lesser offense.

D. ARGUMENT.

THE COURT OF APPEALS ERRED IN HOLDING THAT AN APPELLATE COURT HAS NO AUTHORITY TO REMAND FOR ENTRY OF JUDGMENT AS TO A LESSER OFFENSE UNLESS THE JURY WAS INSTRUCTED ON THE LESSER OFFENSE.

In this case, the Court of Appeals held that an appellate court has no power to remand for entry of judgment as to a lesser offense necessarily found to have been committed unless the jury had been instructed on the lesser offense. In so holding, the Court of Appeals' decision conflicts with previous decisions of this Court. Such a limitation on the appellate court's authority is contrary to 100 years of state jurisprudence in which the appellate courts have used the remand remedy to serve the ends of justice. The limitation is illogical, and would result in disparate treatment of defendants, and inequitable results. The appellate court's authority to apply such a remedy should not be limited by the parties' strategic decisions at trial. This Court should reject the Court of Appeals' limitation of the remand remedy to cases where the jury has been instructed as to the lesser offense, and reaffirm that the

appellate court has broad authority to apply the remand remedy where doing so would serve the ends of justice.

Heidari and the State agree that the evidence was insufficient to support his conviction for Count IV, child molestation in the second degree. This claim is not time-barred because it falls within the exception to the time bar provided by RCW 10.73.100(4) for claims that the evidence was insufficient to support the conviction.

Child molestation in the second degree is committed when a person has sexual contact with a child who is at least twelve but less then fourteen years old. RCW 9A.44.086. Sexual contact is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." RCW 9A.44.010(2). Contact is "intimate" if a person of common intelligence would know that the parts touched were intimate. State v. Jackson, 145 Wn. App. 814, 187 P.3d 321 (2008) (concluding that ejaculation constitutes sexual contact).

In the present case, there was no substantial evidence of sexual contact because B.Z. testified that she successfully avoided putting her mouth on Heidari's penis. B.Z. testified that, with his penis erect and exposed, Heidari put his hand on her head and

tried to push her face toward his penis. RP 10/9/02 360-61. She moved her head to the side and ultimately ran out of the bedroom. RP 10/9/02 361.

The conduct proven at trial does not establish the completed crime of child molestation in the second degree. The victim was clear that her mouth did not touch Heidari's penis. There is no indication from her testimony at trial that any other part of her body touched Heidari's penis. Heidari touched the victim's head in an attempt to force her to perform fellatio, but the head is not an intimate part of the body even under these circumstances. The evidence established the crime of attempted child molestation in the second degree, not the completed crime.

RCW 10.61.003 and 10.61.006 provide that a criminal defendant may be convicted at trial on the charged offense, a lesser degree of the charged offense, an attempt to commit the charged offense, or an offense that is necessarily included within the charged offense. These statutes codify the common law rule that the trier of fact can find the defendant guilty of a lesser offense necessarily included in the offense charged. State v. Berlin, 133 Wn.2d 541, 544-45, 947 P.2d 700 (1997). Properly applied, they satisfy the constitutional notice requirement. State v. Porter, 150

Wn.2d 732, 736, 82 P.3d 234 (2004). Thus, a defendant charged with a crime receives sufficient notice that he may also be convicted of a lesser degree, an attempt or a lesser included offense. State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979).

The appellate court may "reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and interest of justice may require." RAP 12.2. Washington courts have long held that when an appellate court reverses a conviction, it may direct the trial court to enter judgment on a lesser offense charged when the lesser offense was necessarily proven at trial. State v. Garcia, 146 Wn. App. 821, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009). This remedy has been employed when the greater offense is reversed for insufficient evidence. State v. Bucknell, 144 Wn. App. 524, 530, 183 P.3d 1078 (2008).

In Washington, the appellate court's authority to reverse a conviction and remand for entry of judgment on a lesser crime that was clearly proven to the trier of fact is more than 100 years old. In State v. Watson, 2 Wash. 504, 27 P. 226 (1891), this Court reversed the defendant's conviction for assault with intent to commit murder based on a charging deficiency and remanded for

sentencing as to simple assault. Similarly, in State v. Freidrich, 4 Wash. 204, 224, 29 P. 1055 (1892), this Court reversed the defendant's conviction for murder in the first degree based on insufficient evidence of premeditation, and remanded for entry of judgment of murder in the second degree. In State v. Lillie, 60 Wash. 200, 204, 110 P. 801 (1910), this Court reversed the defendant's conviction for assault with a deadly weapon and remanded for entry of judgment of simple assault. This remedy has been applied in numerous appellate cases since. State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970) (second degree assault reversed for insufficiency and remanded for entry of judgment for third degree assault); Garcia, supra, 146 Wn. App. at 829-30 (third degree assault reversed for insufficiency and remanded for entry of judgment for fourth degree assault); Bucknell, supra, 144 Wn. App. at 520 (second degree rape reversed for insufficiency and remanded for entry of judgment for third degree rape); State v. Scherz, 107 Wn. App. 427, 437, 27 P.3d 252 (2001) (first degree robbery reversed for insufficiency and remanded for entry of judgment for second degree robbery); State v. Maganai, 83 Wn. App. 735, 740, 923 P.2d 718 (1996) (attempted first degree rape reversed for insufficiency and remanded for entry of judgment for

attempted second degree rape); State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (first degree theft reversed based on improper aggregation and remanded for entry of judgment for second degree theft); State v. Robbins, 68 Wn. App. 873, 877, 846 P.2d 585 (1993) (trial court properly arrested judgment for possession with intent to deliver based on insufficiency and entered judgment for possession); State v. Gilbert, 68 Wn. App. 379, 388, 842 P.2d 1029 (1993) (first degree burglary reversed for insufficiency and remanded for entry of judgment for residential burglary); State v. Cobelli, 56 Wn. App. 921, 925-26, 788 P.2d 1081 (1990) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession); State v. Brown, 50 Wn. App. 873, 878-79, 751 P.2d 331 (1988) (first degree criminal trespass reversed for insufficiency and remanded for entry of judgment for second degree criminal trespass); State v. Kovac, 50 Wn. App. 117, 121, 747 P.2d 484 (1987) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession); State v. Ellard, 46 Wn. App. 242, 247, 730 P.2d 109 (1986) (first degree theft reversed for insufficiency and remanded for entry of judgment for second degree theft); State v. Thompson, 35 Wn. App. 766, 772, 669 P.2d 1270 (1983) (first

degree escape reversed for insufficiency and remanded for entry of judgment for second degree escape); State v. Plakke, 31 Wn. App. 262, 268, 639 P.2d 796 (1982), overruled on other grounds by State v. Davis, 35 Wn. App. 506, 667 P.2d 1117 (1983) (first degree robbery reversed for insufficiency and remanded for entry of judgment for second degree robbery); State v. Martell, 22 Wn. App. 415, 419, 591 P.2d 789 (1979) (first degree criminal trespass reversed for insufficiency and remanded for entry of judgment for second degree criminal trespass); State v. Liles, 11 Wn. App. 166, 173, 521 P.2d 973 (1974) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession).

As recognized by the Court of Appeals in its decision, a number of these cases involved jury trials where no lesser included offense instruction was given to the jury. See Lillie, 60 Wash. at 204; Bucknell, 144 Wn. App. at 520; Maganai, 83 Wn. App. at 740; Atterton, 81 Wn. App. at 473-74; Brown, 50 Wn. App. at 878-79; Ellard, 46 Wn. App. at 247; Thompson, 35 Wn. App. at 772; Plakke, 31 Wn. App. at 264; Martell, 22 Wn. App. at 417.

The Court of Appeals relied on State v. Green, 94 Wn.2d 216, 234, 616 P.2d 628 (1980), in reaching its decision. In Green,

this Court stated that "in general, a remand for simple resentencing on a 'lesser included offense' is only permissible when the jury has been explicitly instructed thereon." Id. However, as noted by Division I in State v. Gilbert, that statement was dictum unsupported by any citation to authority. Gilbert, 68 Wn. App. at 384-85. In Green, this Court found insufficient evidence of kidnapping, which was partly the basis for Green's conviction for aggravated murder. Green, 94 Wn.2d at 218. Because the evidence was nonetheless sufficient to prove the alternative means of rape, and because there was no unanimity instruction, this Court remanded for a new trial on aggravated murder based on rape. Id. This Court rejected the State's suggestion that the matter simply be remanded for entry of judgment on the lesser included offense of murder in the first degree, because with no unanimity instruction "we cannot say the jury found all the elements of the lesser included offense of first degree murder which is dependent upon proof of the crime of rape." Id. at 235. Remand for entry of judgment as to murder in the first degree was unavailable not because the jury had not been instructed on that offense, but because there was no way to know whether the jury had unanimously found Green guilty of that offense.

The limitation on the appellate court's authority suggested in dicta in Green and adopted by the Court of Appeals in this case--that remand for entry of judgment on a lesser offense may only occur if the jury was instructed as to the lesser offense--is not supported by authority and is not logical, and should be disavowed by this Court. Pursuant to the Washington Pattern Jury Instructions, when a lesser degree or lesser included or attempt is submitted to the jury as an alternative, the jury is instructed to consider the greater crime first and fill in the verdict if they unanimously agree that the defendant is guilty. WPIC 155.00. If the jury reaches unanimous agreement that the defendant is guilty of the greater crime, the lesser crime is never considered. The lesser crime is only considered if the jury acquits the defendant of the greater crime or cannot reach a unanimous verdict. Thus, the fact that a lesser crime instruction was given is meaningless when the jury has reached a verdict on the greater crime. There is no reason to think that the jury ever considered the lesser crime in its deliberations.

Moreover, the limitation suggested in Green is inequitable. The remand remedy is available if the conviction was obtained through bench trials or where a lesser offense instruction was

given. Thus, a defendant who strategically waives his right to a jury trial, or strategically requests a lesser offense instruction is subject to different remedies than a defendant who did not waive jury or request a lesser offense. Because the prosecution may request an instruction on a lesser included offense, a defendant would be treated differently on appeal based on the actions of the prosecution, rather than his own strategic decisions.[2]

Other jurisdictions have approved of the appellate court's authority to remand for entry of judgment on a lesser offense necessarily proved at trial, regardless of whether the jury was instructed on the lesser offense. U.S. v. Hunt, 129 F.3d 739, 744-46 (5th Cir. 1997); U.S. v. Lamartina, 584 F.2d 764, 766-67 (6th Cir. 1978); U.S. v. Cobb, 558 F.2d 486, 489 (8th Cir. 1977); U.S. v. Brisbane, 367 F.3d 910, 915 (D.C. Cir. 2004); People v. Patterson, 532 P.2d 342, 345 (Colo. 1975); State v. Line, 214 P.3d 613, 629-30 (Hawaii 2009); State v. Shields, 722 So.2d 584, 587 (Miss. 1998); In re York, 756 N.E.2d 191, 197-99 (Ohio. App. 2001).

[2] Ironically, the limitation adopted by the Court of Appeals would prevent the appellate court from remanding for entry of judgment on a lesser offense even where a party had requested the instruction on the lesser offense, if the trial court had refused to give the instruction. See e.g. Plakke, 31 Wn. App. at 264 (concluding that trial court had improperly refused to give instruction as to second degree robbery); Martell, 22 Wn. App. at 417 (trial court refused to give instruction as to second degree criminal trespass).

There is no compelling rationale for limiting the appellate court's authority to remand for entry of judgment on a lesser offense to cases where the jury was instructed on the lesser offense. State courts that have adopted such a limitation seem to be primarily concerned with deterring the State from "overreaching," i.e., filing charges that are not supported by the evidence. See Haynes v. State, 273 S.W.3d 183 (Tex. App. 2008). But a review of the cases in which Washington appellate courts have applied the remedy are not examples of prosecutorial "overreaching." Often, the conviction is reversed on appeal for insufficiency because of a new interpretation of the underlying statute or reversal of a trial court ruling regarding admission of evidence. For example, in State v. Cobelli, 56 Wn. App. at 925, the evidence was found to be insufficient on appeal not because of prosecutorial overreaching, but because the appellate court found that the trial court had improperly admitted the defendant's confession pursuant to the corpus delicti rule. In State v. Gilbert, 68 Wn. App. at 381-82, the evidence was found to be insufficient on appeal because the appellate court disagreed with prior precedent that held that an assault committed outside a burgled building was sufficient to establish first degree burglary. In State v. Atterton, 81 Wn. App. at

472-73, the evidence was found to be insufficient on appeal because the appellate court disagreed with prior precedent that held that the defendant's eight thefts could be aggregated into a single count of first degree theft. A prosecutor who overcharges his or her case risks an acquittal. The risk of acquittal is a sufficient disincentive to overcharge. This Court need not limit its own power to fashion a remedy that serves the ends of justice in order to provide an additional disincentive. The appellate court retains the right to exercise its discretion and not apply the remedy where the court feels it would be unfair.

Heidari's claim that remanding for entry of judgment on a lesser offense violates double jeopardy must be rejected in light of the fact that this appellate remedy has been expressly approved by the United State Supreme Court. In Rutledge v. United States, 517 U.S. 292, 306, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), a unanimous court recounted that "federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." The Court then stated, "This Court has noted the use of such a practice with approval," citing Morris v. Mathews, 475 U.S.

237, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986). Rutledge, 517 U.S. at 306. In Morris, the Court held that although the defendant's conviction for aggravated murder was barred by double-jeopardy,[3] the appellate court could remand for entry of the lesser offense of murder, which was not barred by double jeopardy. 475 U.S. at 247. The Court explained:

> After all, one of the purposes of the Double Jeopardy Clause is to prevent multiple prosecutions and to protect an individual from suffering the embarrassment, anxiety, and expense of another trial for the same offense. In cases like this, therefore, where it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause.

Id. at 247. As this Court has recently explained, the Double Jeopardy Clause protects against three evils: (1) being prosecuted a second time for the same offense after acquittal; (2) being prosecuted a second time for the same offense after conviction; and (3) being punished multiple times for the same offense. State

[3] In Morris v. Mathews, the aggravated murder conviction was barred by double jeopardy because Mathews had pled guilty to aggravated robbery before he had been charged with murder. The murder charge was lodged after additional evidence came to light that the victim, who was Mathews' accomplice during the robbery, had not accidentally shot himself as the police initially believed, but had been murdered by Mathews while the two were evading arrest. 475 U.S. at 239-41.

v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). When the appellate court remands for entry of judgment on a lesser offense after conviction on a greater, the defendant is not being prosecuted a second time and is not being punished multiple times. The Double Jeopardy Clause is not violated.[4]

Washington courts have long held that appellate courts have the authority to remand for entry of judgment on a lesser offense where it is clear that the trier of fact found the elements of that lesser, regardless of whether the jury was instructed as to the lesser offense. Because an attempt is the functional equivalent of a lesser degree pursuant to RCW 10.61.003, the appellate court may also remand for entry of judgment for an attempt to commit the charged crime where it is clear the trier of fact found sufficient evidence to support that crime. An attempt is committed when the defendant takes a substantial step toward commission of the crime with the intent to commit the crime. RCW 9A.28.020(1). By finding

[4] In fact, the remand remedy has been utilized as a means to *avoid* the Double Jeopardy Clause implications of retrial for a lesser offense. See J. Shellenberger and J. Strazella, The Lesser Included Offenses Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies, 79 Marquette L. Rev. 1, 183-89 (1995). In Greene v. Massey, 437 U.S. 19, 25 n.7, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978), the Court left open the question of whether the State can retry a defendant for a lesser included offense after the appellate court has reversed a conviction for the greater offense based on insufficient evidence.

Heidari guilty of the completed crime, the jury necessarily found that Heidari acted with the intent to commit the crime and took a substantial step toward its commission when he grabbed B.Z.'s head and tried to force it toward his erect and exposed penis.

Heidari attempts to rely on State v. Charley, 48 Wn.2d 126, 291 P.2d 673 (1955), and State v. Swane, 21 Wn.2d 772, 153 P.3d 311 (1944), for the proposition that the appellate court cannot remand for entry of judgment on an attempt crime. In both of those cases, this Court reversed the defendants' convictions for sodomy based on insufficient evidence of the completed crime and remanded with instructions to dismiss the charge. Both cases were decided in two-page decisions that contain no analysis or discussion of whether remand for entry of judgment for the lesser offense of attempted sodomy would be appropriate. However, these decisions can be explained by recognition that the crime of sodomy as defined at that time contained no intent element. See State v. Olsen, 42 Wn.2d 733, 734, 258 P.2d 733 (1953) (citing sodomy statute which required only "carnal knowledge," which was defined as "any sexual penetration"). Thus, in finding a defendant guilty of

the completed crime, the jury did not necessarily find him guilty of attempt, which requires both a substantial step and the intent to commit a specific crime. See RCW 9A.28.020. As such, remand for entry of judgment for attempted sodomy would not have been appropriate in Charley or Swane even if the jury had received an instruction as to attempted sodomy. In contrast, because child molestation in the second degree requires proof of intent, the jury necessarily found intent in finding Heidari guilty. State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

Because the evidence is insufficient to support Heidari's conviction for child molestation in the second degree, but sufficient to support conviction for attempted child molestation in the second degree, the Court of Appeals could have remanded for entry of judgment for attempted child molestation in the second degree as to Count IV. This Court should reverse the Court of Appeals' holding that an appellate court has no power to do so.

E. CONCLUSION.

This Court should grant Heidari's personal restraint petition, vacate his conviction of child molestation in the second degree in

Count IV, and remand for entry of judgment on attempted child molestation in the second degree as Count IV and resentencing.

DATED this 11th day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for petitioner Heidari, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the State's Supplemental Brief, in IN RE PERSONAL RESTRAINT OF HEIDARI, Cause No. 85653-2, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

08/11/2011
Date

Done in Seattle, Washington

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Dear Supreme Court Clerk,

Attached is a State's Supplemental Brief in the above-mentioned case. Please advise me if there are any difficulties with this electronic filing.

Sincerely yours,

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